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Supreme Court, U.S.
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NOS. 05-7496 and (05-7664)

IN THE SUPREME COURT OF THE UNITED STATES

CECILIO MENDOZA-TORRES, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

orig

REYMUNDO TOLEDO-FLORES,
Petitioner,

Toledo-Flores

v.

UNITED STATES OF AMERICA,
Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES

Respectfully submitted,

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QUESTIONS PRESENTED

As to all petitioners:

I. Has the Fifth Circuit erred in holding - in opposition to the Second, Third, Sixth, and Ninth Circuits - that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?

As to the petitioners in No. 05-7496 only:

II. For purposes of the third prong of plain-error review under Fed. R. Crim. P. 52(b), is the plain error of treating the Federal Sentencing Guidelines as mandatory (in contravention of this Court's decision in United States v. Booker, 125 S. Ct. 738 (2005)) a ***structural*** error that necessarily affects a defendant's substantial rights?

(SUBSIDIARY QUESTION: Should this Court hold this case pending this Court's resolution of a similar question in Washington v. Recuenco, No. 05-83, cert. granted, 126 S. Ct. 478 (Oct. 17, 2005)?)

III. Even if this type of Booker error is not structural, has the Fifth Circuit nevertheless misapplied this Court's decision in United States v. Dominguez Benitez, 542 U.S. 74 (2004), by requiring more than a "reasonable probability" that this error affected a defendant's sentence?

IV. Should this Court grant certiorari to resolve the deep, three-way circuit split respecting the proper application of the plain-error rule to unpreserved Booker error?

V. Should this Court overrule its prior decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), and hold that, where the fact of a prior conviction raises the applicable statutory maximum, the Constitution requires that such prior conviction be alleged in the indictment (in federal prosecutions) and proved to a jury beyond a reasonable doubt?

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PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES

Pursuant to Supreme Court Rule 15.6, petitioners Cecilio Mendoza-Torres, et al., in No. 05-7496, and petitioner Reymundo Toledo-Flores in No. 05-7664, hereby file the following joint Reply to the Brief for the United States (hereafter "U.S. Br.").[1]

I.

In its brief, the government notes that, in the case of Lopez v. Gonzales, No. 05-547, it has "agreed with the petitioner in that case that the Court should grant certiorari to decide whether the commission of a controlled substance offense that is a felony under state law, but that is generally punishable under the Controlled Substances Act only as a misdemeanor, constitutes an 'aggravated felony,' within the meaning of 8 U.S.C. § 1101(a)(43)." U.S. Br. 7-8. The government suggests that, in light of the position it has taken in Lopez v. Gonzales, "the Court may wish to hold the petition in No. 05-7664 [i.e., that of petitioner Toledo-Flores] and the petition in No. 05-7496, with respect to the first question presented only and with respect to petitioners Mendoza-Torres, S[au]zo-Izaguirre, Alejo-Agramon, Eguia-Hernandez, Armendariz-Chavez, Palencia-Contreras, and Vences only, pending the Court's disposition of the petition for a writ of certiorari in Lopez v. Gonzales, No. 05-547." U.S. Br. 8.

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[1] Petitioners file jointly because the government filed a single consolidated response to both of these petitions.

The government argues, however, that "[t]he petition in No. 05-7496 should be denied with respect to . . . petitioners[ ] Colatos-Rivas, Guardado-Ortega, Loredo-Pecina, and Ramirez-Maldonado." U.S. Br. 5. The government argues that, because each of these four petitioners has discharged his prison sentence and has been deported from the United States, their prospects of relief from prevailing on this claim, which implicates only their criminal sentences, "are too speculative to justify an exercise of this Court's certiorari jurisdiction and may be too speculative to avoid mootness." U.S. Br. 7; see also U.S. Br. 5-7.

The government is correct that this Court should, at a minimum, hold the petitions in No. 05-7664 (i.e., that of petitioner Toledo-Flores) and the petition in No. 05-7496, at least with respect to petitioners Mendoza-Torres, Sauzo-Izaguirre, Alejo-Agramon, Eguia-Hernandez, Armendariz-Chavez, Palencia-Contreras, and Vences, pending the Court's disposition of the petition for a writ of certiorari in Lopez v. Gonzales, No. 05-547. The question of statutory interpretation presented in Lopez is precisely the same as that presented in these cases, and the fact that the question arises in a criminal law context in these cases, as opposed to the immigration law context in Lopez, should make no difference as far as the resolution of that question. Cf. Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (declining to interpret 18 U.S.C. § 16 differently in the immigration context than in the criminal law context "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or

noncriminal context . . .").

The government is ***not*** correct, however, with respect to its proposed disposition of the petition in No. 05-7496 as to petitioners Colatos-Rivas, Guardado-Ortega, Loredo-Pecina, and Ramirez-Maldonado. At the outset, the government makes a factual misstatement when it asserts that "each of those petitioners has completed his sentence . . . ." U.S. Br. 5. To be sure, each of these petitioners has completed the ***imprisonment*** component of his sentence; but each of these petitioners is still subject to the ***supervised release*** component of his sentence.[2] See, e.g., United States v. Gonzalez, 250 F.3d 923, 928 (5th Cir. 2001) ("Supervised release, while a form of post-imprisonment supervision, is still considered to be a component of the defendant's total sentence.") (citations omitted); see also 18 U.S.C. § 3583(a) ("The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include ***as a part of the sentence*** a requirement that the defendant be placed on a term of supervised release after imprisonment . . ."") (emphasis added).

The fact that these petitioners are still subject to the supervised release component of their sentences prevents mootness, and gives them a sufficiently concrete stake in the disposition of the question presented. First, especially with the increased sentencing discretion enjoyed by federal district courts in the

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[2] The supervised release terms were not extinguished by the defendants' removal from the United States. See, e.g., United States v. Brown, 54 F.3d 234, 238-39 (5th Cir. 1995).

wake of United States v. Booker, 543 U.S. 220 (2005), the sentencing courts in these cases could, on remand, impose a reduced term of supervised release (or even eliminate the term of supervised release altogether, since no minimum term upon resentencing is required by the statute of conviction in these cases.) Furthermore, a favorable disposition of this question could potentially result in a Guidelines sentencing range where a prison sentence of one year or less could be imposed - in which case even the Guidelines do not require ***any*** supervised release to be imposed. See USSG § 5D1.1(a) (supervised release term required only "when a sentence of imprisonment of more than one year is imposed, or when required by statute").

Finally, while excessive imprisonment erroneously served is not ***automatically*** subtracted from the term of supervised release upon remand, see United States v. Johnson, 529 U.S. 53, 54 and 57-60 (2000); United States v. Jeanes, 150 F.3d 483, 485 (5th Cir. 1998), such wrongful or excessive imprisonment is a factor that district courts may permissibly consider in setting the length or conditions of supervised release on remand. Cf. Johnson, 529 U.S. at 60 (noting that wrongful incarceration may be equitable consideration militating in favor of modification or early termination of supervised release term); Jeanes, 150 F.3d at 485 (same). For all these reasons, every circuit to have addressed the issue has held that the possibility of a reduced or eliminated term of supervised release renders an appeal of a Guideline application non-moot, even though the defendant may already have served the

prison sentence corresponding to that application. See, e.g., United States v. Castro-Rocha, 323 F.3d 846, 847-48 n.1 (10th Cir. 2003) (so holding and collecting other cases so holding).[3] Consequently, even those petitioners who have already served their prison sentences still possess a sufficiently concrete stake in the resolution of the question presented so as to justify exercise of this Court's certiorari jurisdiction.[4]

II.

In sum, this Court should, at a minimum, hold ***both*** of these petitions, as to ***all*** petitioners, pending the disposition of the

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[3] Coincidentally, Castro-Rocha is very similar to the instant case. In that case, the defendant, prosecuted for illegal reentry after deportation under 8 U.S.C. § 1326, received a sentencing enhancement on the ground that his Texas felony conviction for simple possession of a controlled substance was an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B) (as incorporated by reference in USSG § 2L1.2). Before his appeal to the United States Court of Appeals for the Tenth Circuit was decided, however, the defendant completed his prison sentence (and presumably was removed from the United States). The Tenth Circuit rejected the government's assertion that the appeal was thereby rendered moot, for the reasons urged here. See Castro-Rocha, 323 F.3d at 847-48 n.1.

[4] Additionally, by dint of their prior simple-possession convictions' being characterized as "aggravated felonies," all of the petitioners in No.05-7496 were convicted of the more serious offense punished in 8 U.S.C. § 1326(b)(2) by up to twenty years' imprisonment, rather than the lesser offense punished in 8 U.S.C. § 1326(b)(1) by up to ten years' imprisonment. This "heightened stigma associated with an offense the legislature has selected as worthy of greater punishment," Apprendi v. New Jersey, 530 U.S. 466, 495 (2000), is a further continuing consequence of the error alleged here, and hence a further reason for this Court to exercise its certiorari jurisdiction over ***all*** of the petitioners here. See also id. at 484 (where defendant faces a greater potential maximum sentence, "the stigma attaching to the offense [is] heightened").

petition for writ of certiorari in Lopez v. Gonzalez, No. 05-547; and, if certiorari is granted in Lopez, then further hold these petitions (again as to all petitioners) pending a decision in Lopez. As discussed above, even though the statutory question presented in Lopez arises in the immigration context, the resolution of that question in Lopez should apply with equal force to criminal cases like those presented by the petitions here.

If, however, this Court is inclined to grant certiorari on this issue in a criminal case for full briefing and argument in tandem with the immigration case presented in Lopez, we recommend that this Court grant certiorari (1) as to petitioner Mendoza-Torres in No. 05-7496; and/or (2) as to petitioner Toledo-Flores in No. 05-7664. Each of these cases presents an excellent vehicle for deciding this issue, inasmuch as the issue was in each case preserved for appellate review and inasmuch as, in each of these cases, the petitioner received the harsher "aggravated felony" enhancement based upon a conviction for simple possession of a tiny, personal-use amount of cocaine.[5] If the Court believes that plenary consideration of a criminal case would enhance its consideration of the question presented in Lopez, then petitioners pray that the Court consider granting certiorari as to petitioner Mendoza-Torres and/or petitioner Toledo-Flores for full briefing and argument in tandem with Lopez.

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[5] The information available to undersigned counsel indicates that Mr. Mendoza-Torres's conviction was for 0.2 grams of powder cocaine, and that Mr. Toledo-Flores's conviction was for 0.16 grams of cocaine.

CONCLUSION

For the foregoing reasons, as well as those set forth in the original petitions for writ of certiorari, the above-captioned petitioners pray that this Court grant certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in their cases.

Date:
March 10, 2006

Respectfully submitted,

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CASE NO. 05-8820

ORIGINAL

IN THE SUPREME COURT
OF THE UNITED STATES

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

Supreme Court, U.S.
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REQUEST FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Mr. Lawrence asks this Court to permit him to proceed *in forma pauperis* pursuant to Rule 39 of the Rules of this Court.

Leave for Mr. Lawrence, a death row inmate, to proceed *in forma pauperis* has been granted by the United States District Court for the Northern District of Florida as well as the United States Court of Appeals for the Eleventh Circuit under the Criminal Justice Act, Title 18 § 3006A. Thus, the Rule permits his application to this Court to be presented without benefit of affidavit or declaration.

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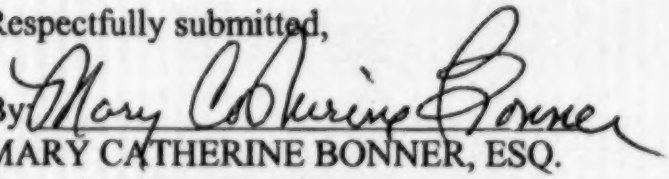
WHEREFORE, Mr. Lawrence seeks leave to proceed *in forma pauperis* before this Court.

Respectfully submitted,

By 

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